82-1678

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

CASE #C-80-118

SUPREME COURT OF THE
UNITED STATES OF AMERICA

SPRING TERM, 1983

ERIN FULTON, RICHARD W. GARRETSON, EUGENE KINSEY, ALLEN NEWLIN, MICHAEL ALLEN WARFIELD, LARRY LIVINGSTON, KENNETH YOUNG, and the class of all other employees of GUY F. ATKINSON, WRIGHT, SCHUCHART-HARBOR similarly situated, and all other members of the CARPENTERS UNION LOCAL NO. 1849, and the LABORERS UNION LOCAL NO. 348, and the IRONWORKERS UNION LOCAL NO. 14, and all similarly situated workers whose employment was suspended on March 14, 1980, due to job curtailment of that date,	ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Petitioners,	
vs.	
PLUMBERS AND STEAMFITTERS, LOCAL 598, and RAY McKNIGHT, their business agent, and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, UNION LOCAL NO. 112,	
Respondents,	

AND

JOHN OSBORN, PETE R. HERNANDEZ, FRED D. HERNANDEZ, EUGENE McVEY, RICHARD LAYMAN, PAT PRICE, C.L. BEAVER, TERRY WEITZEL, ERNEST R. HOLLANDWORTH, EARL L. OWEN, L.E. LeMAY, and DAVID A. CLURE, on behalf of themselves and all other similarly situated,

Petitioners,

vs.

PLUMBERS AND STEAMFITTERS, LOCAL 598, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Gregory A. Beeler,
MORBECK & BEELER, INC., P.S.
313 West Kennewick Ave.
Kennewick, WA 99336
(509) 582-2184

Edwin F. Alden,
WESTLAND LIEBLER IVEY & ALDEN
3250 West Clearwater Ave.
Kennewick, WA 99336
(509) 735-3581

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW
(Rule 21.1(a))

1. Do employees of a target employer (not members of the Defendant union) have standing under §303 of the Labor Management Relations Act as amended (29 USC §187(b)), to sue for lost wages and benefits due to a Defendant labor organization's wrongful conduct violative of 29 USC §158(b)(4)?

2. Are wages "business or property" within the meaning of 29 USC §187(b)?

3. Does the language "by reason of" as employed in §303 of the Labor Management Relations Act (29 USC §187(b)) restrict standing to sue under that statute, to plaintiffs in the "target area" of defendants' illegal activity?

4. If the answer to number 3 is in the affirmative, due to facts of this case as pled by the Plaintiffs, suggest that Plaintiffs are within or without the "target area"?

5. Considering (1) the nexus between the injury alleged by plaintiffs and the statu-

tory violation and, (2) the relationship of the injury alleged to the forms of injury that Congress sought to prevent or remedy by enacting the statute, do Plaintiffs in this case have standing to sue under §303 of the Labor Management Relations Act (29 USC §187(b))?

LIST OF ALL PARTIES
(Rule 21.1(b))

Plaintiffs

Erin Fulton
Richard W. Garretson
Eugene Kinsey
Allen Newlin
Michael Allen Warfield
Larry Livingston
Kenneth Young
John Osborn
Pete R. Hernandez
Fred D. Hernandez
Eugene McVey
Richard Layman
Pat Price
C.L. Beaver
Terry Weitzel
Ernest R. Hollandworth
Earl L. Owen
L.E. LeMay
David A. Clure

Defendants

Ray McKnight
Plumbers and Steamfitters Local #598,
United Association of Journeymen
and Apprentices of the Plumbing
and Pipefitting Industry of the
United States and Canada, AFL-CIO,
International Brotherhood of
Electrical Workers Union Local #112

TABLE OF CONTENTS

	Page No.
Reference to Court of Appeals Decision (Rule 21.1(d))	1
Grounds of Supreme Court Jurisdiction (Rule 21(e))	2
Reference to Federal Statutes (Rule 21(f))	2
Statement of the Case (Rule 21.1(g))	3
Basis of Original Federal Jurisdiction (Rule 21.1(i))	6
Argument (Rule 21.1(j))	7
Conclusion	24
Text, 29 USC §187 (1976)	Appendix A
Text, 29 USC §158(b)(4)(D) (1976)	Appendix B
Opinion of Court of Appeals	Appendix C
Memorandum Decision of District Court	Appendix D
Judgment of District Court	Appendix E

TABLE OF AUTHORITIES

(CASES)

	Page No.
Blue Shield of Virginia vs. McCready, 102 Sup. Ct. 2540 (1982).....	9,11, 13
Erin Fulton, et al, vs. Plumbers and Steamfitters, et al, 695 F.2d 402 (1982).....	9,11, 12,17,22
Milner vs. International Brotherhood of Electrical Workers Local 349, 476 F.2d 8 (Fifth Circuit, 1973).....	14,15, 16,17,19
Summit Valley Industries vs. Local 112, United Brotherhood of Carpenters & Joiners, Sup. Ct. No. 81-497 (1982)...	21
Wells vs. International Union of Operating Engineers, Local 181, 303 F.2d 73 (Sixth Circuit, 1962).....	8,9, 21

(STATUTES)

29 USC §187 (1976) (Labor Management Relations Act §303).....	7,8,9, 11,13,15,16,17, 19,20,22,23,24
15 USC §15 (Clayton Act).....	11,13, 20

TABLE OF AUTHORITIES

(OTHER)

	Page No.
93 Cong. Rec. 4838 (1947) (Remarks of Senator Ball).....	18
45 N.Y.U.L. Rev. 539 (1970) (Standing to Sue Under §303 of the Labor Management Relations Act).....	19,22, 23,24

REPORTS OF COURT OF APPEALS OPINION
(Rule 21.1(d))

The opinion and decision of the Court of Appeals decision in this case is reported as follows:

Erin Fulton, et al, vs. Plumbers and Steamfitters, et al, 695 F.2d 402 (1982).

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED
(Rule 21(e))

A. Petitioners seek review of a decision of the United States Court of Appeals (Ninth Circuit) entered December 28, 1982 (see Appendix C).

B. Jurisdiction of the Supreme Court to grant Certiorari in this case is conferred by 28 USC §1254(1).

FEDERAL STATUTES INVOLVED
(Rule 21(f))

This case particularly concerns two (2) Federal Statutes: 29 USC §187 (1976) (popularly referred to as §303 of the Labor Management Relations Act) and 29 USC §158(b)(4)(D) (1976). Statutes set out verbatim in Appendices A and B, respectively.

STATEMENT OF THE CASE

The Petitioners are employees of Guy F. Atkinson Company & Wright-Schuchart-Harbor, a joint venture (hereinafter AWSH) engaged in various construction projects for the Washington Public Power Supply System (hereinafter WPPSS), on the Hanford Nuclear Reservation in the State of Washington. Most of the Petitioners are carpenters who are members of the United Brotherhood of Carpenters and Joiners (hereinafter Carpenters Union). The other Petitioners belong to other craft unions, including Ironworkers, Laborors, Teamsters and Operating Engineers.

Respondents are Plumbers and Steamfitters Local Number 598, its Business Agent, Ray McKnight and the International Brotherhood of Electrial Workers Local 112. None of the Petitioners are members of the Respondent unions.

A dispute arose in 1979 between the Carpenters Union and Respondent unions concerning work assignments at the Hanford site. The

dispute was submitted to the AFL/CIO Impartial Joint Jurisdictional Disbutes Board (hereinafter The Board), under procedures set forth in the AFL/CIO Constitution. In November, 1979, the Board entered an award determining that some of the work at issue was within the Carpenter's Union work jurisdiction. The employer made its work assignments based upon the Board's decision.

The Respondent unions were evidently unwilling to accept the decision of The Board and, therefore, attempted to coerce their employer to make different work assignments, contrary to 29 USC §158(b)(4)(D). Efforts to coerce the employer, AWSH, included destroying work performed by carpenters on the Hanford site, a strike and a site boycott. As a result of these activities the employer was forced to suspend operations. The suspension lasted ten (10) days, resulting in a layoff of all employees at the site for a ten (10) day period.

On March 25, 1980, Petitioners filed

this action in the United States District Court against the Respondent unions under §303 of the Labor Management Relations Act (29 USC §187 (1976) (hereinafter §303)), seeking recovery of wages and benefits lost during the work suspension. The Petitioners also petitioned for class certification.

On April 24, 1981, the District Court (without reaching the issue of class certification) dismissed the Petitioners' complaint, holding that they lacked standing. On December 28, 1982, the United States Court of Appeals (Ninth Circuit) affirmed the District Court.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT
(Rule 21.1(i))

Jurisdiction in the United States District Court was based upon the provisions of 29 USC §187 (which confers jurisdiction and states the cause of action), and 29 USC §158(b)(4)(D) (which further defines the cause of action).

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
(Rule 21.1(j))

INTRODUCTION

It is respectfully urged that this case involves both special and important questions of Federal Law which have not been, but should be settled, by THIS HONORABLE COURT, and a decision by a Federal Court of Appeals (in this case a decision of the United States Court of Appeals for the Ninth Circuit) in direct conflict with a decision of another Federal Court of Appeals (The Sixth Circuit), on the same matter.

I.

CONFLICT BETWEEN THE CIRCUITS

In summary, the issue presented is whether or not employees of an employer who is the immediate target of unlawful union activity, for which liability is created by §303 of the Labor Management Relations Act (29 USC §187 (1976)) (hereinafter §303), have standing to sue under §303 for lost wages and benefits, when their work is suspended, due to

the defendant unions' activity. Very simply, the Ninth Circuit in this case answered in the negative. The Sixth Circuit has earlier, and unequivocally answered in the affirmative. Wells vs. International Union of Operating Engineers, Local 181, 303 F.2d 73 (Sixth Circuit, 1962).

In Wells, Supra, the Sixth Circuit specifically held that employees of an employer who was the target of illegal secondary activity for which §303 created a right of action, were entitled to sue. The Court stated:

> "The final question raised by the Defendants as to whether the Court had jurisdiction to hear the claims of the individual Plaintiffs, who are the employees of Tye and Wells, is without merit. Clearly, jurisdiction is conferred to permit whoever is injured to sue without respect to the amount in controversy." Wells, Supra, at 75.

While the Wells Court used the word "jurisdiction", we would submit that the context makes clear that the Court is addressing the issue of standing to sue on the part of the individual employees. The Court based its decision on the expansive language of the

statute, and specifically the word "whoever" in subsection (b) of §303. While the Wells Court did not expound at length on the reasoning behind its decision, its holding on the issue at hand is unambiguous. Defendants' claim that the individual employees lacked standing under §303, was rejected.

The Wells holding has not been overruled or discredited by any contrary case in the Sixth Circuit. Indeed, no other case directly on point arose until this case was presented to the Ninth Circuit.

Likewise, the holding of the Ninth Circuit Court of Appeals in Fulton vs. Plumbers and Steamfitters, Supra, is unambiguous. The Fulton Court stated:

> "Applying the standards as refined by McCready and informed by the policies of the National Labor Relations Act, we conclude that appellants lack standing under Section 303." Fulton, Supra, at 407.

The Fulton Court's reasoning will be discussed in greater detail below. At this point we wish to simply point out that the Court's decision is directly contrary to the

decision of the Sixth Circuit in Wells, Supra. The two cases cannot be reconciled.

II.

SPECIAL AND IMPORTANT QUESTIONS OF FEDERAL LAW

There is at present, no decision of the United States Supreme Court which clearly defines the parameters of standing under §303. Particularly, there is no decision of THIS HONORABLE COURT that sets forth criteria for standing, under §303, by third parties who are not the immediate targets of the unlawful union activity. It is respectfully urged that this is a vital question of Federal Law which should be determined by THIS COURT.

We would suggest that a critical review of the decision of the Court of Appeals in this case will reveal the public policy considerations that render this case especially important, incidentally to revealing why the Court of Appeals decision in this case is incorrect.

First of all, the Court of Appeals indicated that its decision was, at least

partially, informed by analogy to decisions construing antitrust statutes containing provisions, and language similiar to §303 (particularly §4 of the Clayton Act, 15 USC §15 (supplement 5, 1981)) (hereinafter §4). The Court of Appeals noted that the "by reason of" language of §303 also appears in §4, and concluded that judicial interpretations of §4 should provide "guidance" in construing §303. Fulton, Supra at 403. Noting that §4 standing has been determined under the "target area" test in the Ninth Circuit, the Court went on to analize this case by said test. The Court of Appeals referred to a recent decision of the United States Supreme Court, Blue Shield of Virginia vs. McCready, 102 Sup. Ct. 2540 (1982), a case dealing with the extent of standing under the antitrust laws, and then proceeded to reach a conclusion manifestly at variance with McCready, Supra, and imposing a standing test, in effect, more rigid than McCready, in §303 cases. The Court of Appeals in this case stated that the key inquiry under

the "target area rule" as they employed it, was whether or not the Plaintiff suffered the type of core injury that Congress sought to prevent by enacting the statute Fulton, Supra, at 407. The Court then determined that Plaintiffs herein lacked standing under that standard. The Court of Appeals reasoned that, inasmuch as the "target" of the illegal union activity was the employer of the Plaintiffs, rather than the Plaintiffs themselves, that the Plaintiffs were not in the "target area" of the Defendants unlawful activity. They were not, so to speak, "aimed at" by Defendants and were "hit" only incidently. The Court of Appeals emphasized that the purpose of the Defendants was, presumably, to coerce the employer to make different work assignments rather than to cause the Plaintiffs to lose wages. Fulton, Supra, at 407. We respectfully suggest that as the facts are outlined in the Plaintiffs' pleadings, it cannot possibly be said that the Plaintiffs were not in the "target area" of the Defendants'

deliberate efforts to shut down the job. Referring to Blue Shield of Virginia vs. McCready, Supra, by analogy, if the consumer of psychologists services in McCready had standing to sue under §4, for anti-competitive activity admittedly directed primarily at psychologists, then certainly the employees of an employer target of unlawful union activity designed to shut down the job site, should also have standing to sue for their lost wages and benefits! To the extent that the §4 analogy has merit, the case at hand under §303 does not extend standing nearly as far as McCready, Supra! The Plaintiffs in this case are not mere suppliers or customers of the target employer. They are employees at the job site which was the immediate focus of the Defendants' activity; activity designed specifically to shut down the job site.

In general, the parameters of standing of third parties, who may not be the immediate target of the unlawful activity complained of, is something which should be

determined by THIS COURT. The issue is a matter of profound national significance, and is currently a matter of unsettled confusion. The case at hand perfectly illustrates that innocent bystanders may be injured by activity proscribed by Federal Law, and for which a remedy is specifically provided by Federal Law (primarily for the protection of innocent bystanders) and those individuals, nonetheless, are denied relief due to a narrow and contrived construction of the Federal Statutes. The availability of the remedy carefully constructed and enacted by the Congress thereby has been denied to a class of people who most deserve and need its protection.

We would suggest that the decision of the Court of Appeals departs from the clear trend of the cases decided in other circuits, and merits the attention of THIS COURT.

The most recent and well reasoned case, dealing with standing of third parties to sue under §303, is Milner vs. International Brotherhood of Electrical Workers Local 349,

476 F.2d 8 (Fifth Circuit, 1973). Milner involved a Plaintiff engaged in the business of selling electrical supplies on a commission basis. The Plaintiff had a contractual arrangement with the company which was the target of illegal union secondary activity, according to which Plaintiff had the exclusive right in the peninsular Florida area, to sell certain products manufactured by that company. The Sixth Circuit determined that the Plaintiff had standing to sue under §303. The Milner Court stated:

> "From the preceeding discussion, it is clear that a third party can recover damages under Section 303, if he can establish the existence of some combination of the following circumstances: (1) an integrated business enterprise which includes the third party and either the primary or neutral employer; (2) direct injury to the third party's property; and (3) a principal-agent relationship between the third party and the primary employer." Milner, Supra at 11-12.

The Milner Court indicated further that in its view, the above criteria were not exclusive. It went on to say:

> "In determining whether Milner has a right to recover under Section 303, the fundamental question.....is whether such a result.....would threaten or undermine legitimate union interests..... We do not think that recognizing a right to recover in favor of Milner..... raises the spectre of such dire possibilities. Though the union's boycott in this case was intended ultimately, to bring pressure to bear, only upon Southwise, Milner was directly in its line of fire.....
>
> In our opinion, the consequences to Milner were reasonably foreseeable by the unions..... The damage sufferred by Milner was the substantial equivalent of the result which would have been produced if Milner had been the primary object of the union's secondary activity." Milner, Supra at 12. (Emphasis added).

We respectfully suggest that if the Milner Court reasoning had been followed in the case at hand, the result would have been different. Very simply, if the Plaintiff supplier was in the "line of fire" of the Defendant's conduct in Milner, the Plaintiff employees were most certainly in the "line of fire" in this case. Moreover, if the reasoning used by the Court of Appeals in this case had been employed by the Fifth Circuit in Milner, the Plaintiff in Milner would not have

had standing. While the Plaintiff in Milner may have been, so to speak, in the "line of fire", he was not exactly "aimed at", Cf., Fulton, Supra at 407. The Fulton Court's reasoning again is that one must not only be "hit" to have standing under §303, but must be "aimed at". In Milner, the Plaintiff supplier was not the actual target of the unlawful activity. The target was the company the Plaintiff supplied, and Plaintif was hurt because his sales to the target company were drastically reduced.

It is apparent then, that the Ninth Circuit would have decided Milner differently than did the Fifth Circuit. If THIS HONORABLE COURT does not undertake now to decide this issue, tremendous uncertainty will continue to prevail as to the extent of standing and the proper test to determine standing, for neutral third parties, under §303.

Moreover, the continuing uncertainty concerning the extent of standing under §303 will work to the disadvantage of innocent

third parties who most need and deserve the remedy provided by law - and those, in general, about whom Congress was most concerned when it enacted the legislation. The Congressional debates concerning this legislation are replete with references to the need to protect innocent third parties who are victims of jurisdictional strikes and secondary boycotts. See, e.g., 93 Cong. Rec. 4838(1947)(Remarks of Senator Ball). Both Defendants and the Court of Appeals referred to this same language and argued that Congress' principal aim was to protect farmers and small businessmen. A fair reading of such comments, in their context, however, reveals that the needs of farmers and small businessmen were used as illustrations of damage to innocent third parties. Those, in other words, who are not the immediate target of the unlawful activity! If innocent third party victims of a jurisdictional dispute are to receive the benefits of the remedy Congress created, they must be said to have standing. It is again respectfully urged that if any such third

party victims are to have standing, the Plaintiffs in this case must have standing. These Plaintiffs have a closer connection with the target employer, and suffered a more direct impact from the job shutdown (loss of their employment), than a Plaintiff such as the Plaintiff in Milner, Supra. Also, it is only fair to note that, whereas the Plaintiff in Milner might have had other customers, the Plaintiffs in this case lost their work, that is, their sole livelihood.

Further, we would respectfully suggest that there are policy considerations underlying the Labor Management Relations Act that call for a test for standing even broader than that employed in the antitrust cases. This thesis is elaborated in the Comment, Standing to Sue Under §303 of the Labor Management Relations Act, 45 N.Y.U.L. Rev. 539 (1970). The comment discusses the policy differences between §303 and the antitrust statutes with respect to the issue of standing as follows:

> "Courts have imposed numerous limitations on the right of recovery under

Section 4 of the Clayton Act to avoid a proliferation of suits that would unfairly burden the defendant. Most of these policy considerations are noticeably absent in Section 303 suits. First, while Section 4 compensates a victim of antitrust activity, the major thrust of the section is to encourage private damage suits as a deterrent to the illegal activity through the use of treble damages. While Section 303 naturally has some deterrent value, it is clear that the purpose of that section is compensatory..... Secondly, the "windfall" provided by treble damages under Section 4 necessitates limiting such extraordinary relief to a small number of plaintiffs. Finally, Section 4 contains a "partial pass on" situation, whereby many plaintiffs are compensated for an amount greater than the injury actually inflicted upon them by the defendant. Thus, the sum of all the plaintiffs' recoveries under Section 4 is far greater than the amount the defendant gained by his illegal conduct. Under Section 303, however, a party recovers only what he actually lost as a result of the defendant union's action.....

In sum, the policy considerations and practical impact in Limiting Standing under Section 303 are based on factors entirely different from those of Section 4 of the Clayton Act. Thus, the rules derived from Section 4 cases should not be blindly applied to Section 303." 45 N.Y.U. L. Rev., Supra at 549-51.

In addition, it may now be noted that a prevailing party under §303 (unlike §4)

may not recover attorney's fees. Summit Valley Industries vs. Local 112, United Brotherhood of Carpenters & Joiners, Sup. Ct. No. 81-497, decided June 1, 1982.

Beyond these considerations, we would point out that fears of massive, destabilizing litigation by injured employees against other unions are purely speculative. Until Fulton, Supra, the extant authority certainly seemed to allow such lawsuits (See Wells, Supra) and extensive litigation of this nature has never been reported.

The Court of Appeals in this case indicated that the purpose of the National Labor Relations Act, to promote industrial peace, would not be served by allowing standing to these Plaintiffs. The Court, without citation of authority, indicated generally that it felt "extending" liability to employees of an "injured concern" could create a financial burden and destabilizing effect upon a union, rendering it incapable of effective representation. The Court also said, again

without citation of authority, that the threat of such a liability might somehow inhibit legitimate union activity, Fulton, Supra at 408. This analysis ignores the compensatory purpose of the Labor Management Relations Act alluded to above, and conveniently ignores the fact that the employees of the target company were particularly injured by the Defendant unions' conduct. It should also be noted in this regard that liability under §303 extends only to specified, intentional violations of the Labor Management Relations Act. It does not extend to every conceivable unfair labor practice of which a union might be guilty. For example, there is no §303 liability for a union which might be adjudged to have failed to bargain in good faith. Quite simply, however, the Court of Appeal's fails to give effect to the policy of Congress in enacting §303 to provide compensation for those who might be injured by this type of deliberate union misconduct. The previously cited Comment, Standing to Sue Under §303 of the Labor

Management Relations Act (1970), also observed:

> "While the case law on the subject is slight, and poorly articulated, the Courts have given employees the right to sue under Section 303 to recover salaries lost as a result of lay-offs caused by the secondary activity.....
>
> Even if the case law is interpretated to extend recovery to third parties who are either employees of the neutral or primary employer or those who have an integrated system of business operations with such an employer, an additional rule extending recovery to other types of third parties is required. Both the legislative history and the broad wording of the LMRA indicate that these two classifications of parties with standing, do not exhaust the list of third parties entitled to recover damages under Section 303. Further proof of the intent of Congress can be found in the parity between Section 303 to give private parties a remedy in the Courts to complement the remedies available through the NLRB for the same union conduct. Since anyone, even a party having no connection with the Union activity or the employer, can file a Section 8(b)(4) charge with the Board and thus initiate the process of Board remedies, it would seem anomalous for Congress to narrowly limit a class of parties who can seek complimentary remedies under Section 303. This is particularly true where Congress chose to word the section to apply to "whoever" is injured by secondary activity. Finally, it is logical for Congress to have intended Section 303 to be a broad remedy for secondary activity because it limited the scope of prohibited activity to only those situa-

> tions where the overwhelming consensus of opinion condemns the unlawful conduct. Since Congress intended a broad application of this Section, the Courts should abide by that determination, subject only to the limitations necessary to prevent the undermining of other Sections of the statutory scheme by an overly expansive reading of Section 303." 45 N.Y.U. L. Rev., Supra at 554-56. (Citations omitted and emphasis in original).

CONCLUSION

We respectfully urge THIS HONORABLE COURT to end the confusion and uncertainty presently existing as to the extent of standing under §303. Until that is done, many, such as the Petitioners in this case, will be improperly denied the remedy and protection that Congress provided. Innocent third parties especially will be deprived of their remedy, while the District Courts remain uncertain as to whether or not a particular class of neutral third party victims has standing under the statute. We ask THIS COURT to give effect to the language of the statute that "Whoever may be injured....." by reason of the type of union misconduct alleged here may be com-

pensated for said injury.

To this end, we respectfully ask THIS COURT to grant this petition for a Writ of Certiorari, and to consider our request that the decision of the Court of Appeals be reversed with directions to the District Court to proceed with this action on the merits.

Respectfully submitted this 17th day of March, 1983.

Gregory A. Beeler

GREGORY A. BEELER
Attorney at Law
MORBECK & BEELER, INC., P.S.

EDWIN F. ALDEN
Attorney at Law
WESTLAND, LIEBLER, IVEY & ALDEN

APPENDIX A

29 USC §187(1976) cited herein as Section 303 of the LMRA, provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended [29 USCS § 158(b)(4)].

(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof [29 USCS § 185] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

APPENDIX B

29 USC §158(b)(4)(D) (1976) provides:

It shall be an unfair labor practice for a labor organization or its agents- -

. . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, here in either case an object thereof is-- . . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or

class, unless such employeer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

. . . .

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIN FULTON, et al.,	)	No. 81-3405
	)	D.C. Nos.
Plaintiffs-Appellants,	)	C-80-107
	)	C-80-118
v.	)	
	)	
PLUMBERS AND STEAMFITTERS, et al.,	)	OPINION
	)	
Defendants-Appellees.	)	
	)	
JOHN OSBORN, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
PLUMBERS AND STEAMFITTERS, et al.,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Eastern District of Washington
R.J. McNichols, District Judge, Presiding
Argued and submitted July 7, 1982

Before: WRIGHT, TANG and CANBY, Circuit Judges.

TANG, Circuit Judge:

This appeal is from a district court dismissal of complaints filed by appellants in these consolidated actions for damages pursuant to section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976). The district court dismissed the complaints, holding that appellants lacked standing under section 303 to maintain the suit. We affirm.

I. Background 1/

Appellants are employees of Guy F. Atkinson Company and Wright - Schuchart - Harbor, a joint venture engaged in various construction projects for the Washington Public Power Supply System on the Hanford Nuclear Reservation in Washington. Most of the appellants are carpenters who are members of the United Brotherhood of Carpenters and Joiners (hereinafter

"Carpenter's Union"). The other appellants belong to other craft unions, including the Ironworkers, Laborers, Teamsters, and Operating Engineers.

Appellees are Plumbers and Steamfitters Union, Local No. 598, its business agent Ray McKnight, and the International Brotherhood of Electrical Workers, Local No. 112. The two appellee unions represent pipefitters and electricians employed at the Hanford construction site. None of the appellants are members of the appellee unions.

A dispute arose in 1979 between the Carpenter's Union and the appellee unions concerning certain work assignments at the Hanford construction site. The dispute was submittd to the AFL-CIO's Impartial Jurisdictional Disputes Board under procedures set forth in the AFL-CIO Constitution. In November 1979, the Board entered an award determining that part of the work at issue was within the Carpenter Union's work jurisdiction. The employer made its work assignments based upon

the award.

In March 1980, the appellee unions submitted to the site employer a demand to reassign the disputed work from the carpenters to members of the appellee unions. Shortly afterward, members of the appellee unions destroyed work completed by the carpenters at the site and encouraged a strike and site boycott. Because of these activities, the site employer suspended operations for ten days. All the employees at the site were laid off during the work suspension, resulting in a ten-day wage loss.

On March 25, 1980, appellants filed an action in federal district court against appellees under section 303 of the Labor Management Relations Act [hereinafter LMRA], 29 U.S.C. §187 (1976).2/ The complaint alleged that appellee's actions constituted a violation of section 8(b)(4)(D) of the LMRA, 29 U.S.C. § 158(b)(4)(D)(1976)3/, and sought damages for the wages lost during the work suspensions. Appellants also petitioned for class

certification.

Appellees answered with a general denial, and moved to dismiss the action on the ground that appellants lacked standing to sue under section 303. On April 24, 1981, the district court granted appellees' motion, holding that appellants lacked standing because: (1) appellant's wage loss was "incidental" and "secondary" to the alleged violation of section 8(b)(4)(D); and (2) wages are not "business or property" within the meaning of section 303 and are therefore not recoverable under the section. The question of class certification was not reached. Appellants appeal the dismissal.

II. Discussion

In this appeal we must decide whether employees of an enterprise injured by a union's violation of section 8(b)(4)(D) of the LMRA have standing under section 303 of the LMRA to maintain a suit for damages against the offending union. Section 303(b) of the LMRA provides that "[w]hoever shall be injured in his

business or property by reason of" a union's violation of section 8(b)(4) of the LMRA has a federal cause of action to recover damages. Appellants argue that section 303 imposes no greater standing limitation than that imposed generally by article III of the United States Constitution. Relying principally on the statute's reference to "whoever", appellants maintain that any plaintiff suffering an actual loss or injury attributable to a union's violation of section 8(b)(4) has standing to pursue an action for damages under section 303.

The expansive interpretation urged by appellants overlooks the section 303 requirement that the injury must occur "by reason of" a section 8(b)(4) violation. We conclude that the "by reason of" language imposes standing limitations. We are drawn to this conclusion by comparisons to the operative effect of similar statutory language in the antitrust field, or analysis of the statute's legislative history and by interpretations of section 303's standing requirements enunciated by

courts in other circuits.

The language of section 303(b) of the LMRA is strikingly similar to that of section 4 of the Clayton Act, 15 U.S.C. § 15 (Supp. V 1981).4/ The similarity in language utilized by Congress in drafting the two sections has prompted this circuit to look to judicial interpretations of section 4 for guidance in construing section 303. Mead v. Retail Clerks International Ass'n, Local 839, 523 F.2d 1371, 1376 (9th Cir. 1975). The "by reason of" phrase appearing in section 303 also appears in section 4. This circuit has interpreted the phrase to impose standing limitations in the section 4 antitrust context. See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir.), cert. denied sub nom., 414 U.S. 1045 (1973). Thus, it would seem appropriate to give a similar interpretation to the phrase in the context of the LMRA.

This conclusion follows not only from the similarity in the language of the two statutes

but also from the legislative history of section 303. The ligislative history surrounding the enactment of section 303 suggests that the similarity in language was intentional, and that Congress intended for courts to look to antitrust standing principles formulated under section 4 for guidance in interpreting the standing requirements embodied in section 303.5/ Moreover, a majority of the courts that have examined standing under section 303 have adopted standards formulated under section 4 of the Clayton Act. See Comment, Standing to Sue Under Section 303 of the Labor Management Relations Act, 45 N.Y.U.L. Rev. 539, 546, 549-51 (1970); Case Note, 43 Cin. L. Rev. 212, 215-16 (1974). For example, in United Mine Workers, Dist. 19 v. Osborne Mining Co., 279 F.2d 716 (6th Cir.), cert. denied, 364 U.S. 881 (1960), the Sixth Circuit borrowed the "direct/remote injury" test from the antitrust context and employed that standard to determine section 303 standing.6/ See also United Brick & Clay Workers v. Deena Artware, 198 F.2d 637,

644, (6th Cir.), cert. denied, 344 U.S. 897 (1952) (analogy drawn to antitrust laws in context of standing determination under section 303); Gilchrist v. United Mine Workers, 290 F.2d 36, 39 (6th Cir.), cert. denied, 368 U.S. 875 (1961) ("direct/indirect" test employed); W.J. Milner & Co. v. International Brotherhood of Electrical Workers, Local 349, 476 F.2d 8, 12 (5th Cir. 1973) ("line of fire" test prevalently employed in antitrust context utilized in determining section 303 standing).

We therefore conclude that we should look to the standing principles we have developed under section 4 of the Clayton Act for guidance in interpreting section 303's standing requirements. We are not obliged, however, to follow blindly the results obtained in the antitrust context. Our application of the principles of standing developed under section 4 have been informed by the broad remedial policies the antitrust laws reflect and seek to serve. See, e.g., Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1387 (9th Cir. 1982). The regula-

tory scheme and objectives of the National Labor Relations Act are, however, fundamentally different from the scheme and purposes of the antitrust laws. Thus, while we may look to antitrust principles for general guidance, the policies reflected in the National Labor Relations Act must inform the standards' application under section 303. We proceed with this caveat in mind.

In our circuit, section 4 standing has been determined under the "target area" test. See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 127-30 (rejecting the "direct/remote injury" test and embracing the "target area" approach). The target area rule confers standing if the plaintiff was within the target area of the defendant's illegal practices and was not only "hit", but also "aimed at." Karseal v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955). A plaintiff satisfies this standard by being "within the area of the economy which [defendants] reasonably could have or did

foresee would be endangered by the breakdown of competitive conditions." In re Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973), cert. denied sub nom., 415 U.S. 919 (1974). The key to meeting this burden is a demonstration that the plaintiff suffered the type of core injury that congress sought to prevent by enacting the antitrust laws. See Solinger v. A&M Records, 586 F.2d 1304, 1311 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979). See also 2 Areeda & Turner, Antitrust Law ¶ 334d at 166 (1978). The Supreme Court recently refined these principles in Blue Shield of Virginia v. McCready, 102 S.Ct. 2540 (1982). The court held that when "faced with a claim that an injury is too remote from the alleged violation to warrant § 4 standing", a court must look to (1) the nexus between the injury and the statutory violation, and (2) the relationship of the injury alleged to the forms of injury that Congress sought to prevent or remedy by enacting the statute. Id. at 2548.7/

Applying the standards as refined by McCready and informed by the policies of the National Labor Relations Act, we conclude that appellants lack standing under section 303. This action arises from a work jurisdiction dispute. The principal object of appellee unions' illegal activities was to pressure the site employer to reassign work from the members of the Carpenter's Union to members of the appellee unions. Instead of acceding to this pressure, the employer responded by suspending operation and temporarily laying off workers. This consequence was not a "necessary and intergral" aspect of the section 8(b)(4)(D) violation. The injury alleged is too remote from the alleged violation to warrant section 303 standing. Thus, the required nexus between the injury and the section 8(b)(4)(D) violation has not been established.

It is also apparent that the injury alleged is not reflective of Congress' core concerns in prohibiting the type of conduct engaged in by appellee unions. Section 303's legislative

history reveals that Congress was principally concerned with the debilitating effect secondary activity and jurisdictional disputes have on farmers and small businesses. See, e.g., 93 Cong. Rec. 4838 (1947) (remarks of Senator Ball), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1354 (1948); S. Rep. No. 105 on S.1126, Supplemental Views, 80th Cong., 1st Sess. 54 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 460 (1948). We are unable to find any indication that Congress sought to extend the right of action afforded by section 303 to employees of an injured employer and we are unwilling to render such a broad interpretation of the statute.

The avowed purpose of the National Labor Relations Act is the promotion of industrial peace by the creation of stable collective bargaining relationships. 29 U.S.C. § 151 (1973). The imposition of unlimited liability would tend to subvert our national labor policy.

If employees of an injured concern are permitted to sue, unions would become subject to liability to a potentially huge class of plaintiffs. The plaintiffs in this case sought to represent a class of nearly 1800 employees. The resultant financial burden may have a destabilizing effect upon the union and render it incapable of effective representation. Moreover, the threat of such liability may inhibit legitimate union activity, frustrating the exercise of rights granted by the National Labor Relations Act. In light of these considerations, we are not persuaded that extension of liability to the class of employees of an injured enterprise is reflective of the core concerns that Congress sought to address by the enactment of section 303.8/

III. Conclusion

Section 303 of the Labor Management Relations Act provides a remedy to "whoever" is injured "by reason of" a labor organization's violation of section 8(b)(4). We are asked to construe this statute to confer standing to

sue to anyone who can demonstrate an injury. Having reviewed our precedents, the legislative history of section 303, and the policies of our national labor laws, we conclude that Congress did not intend to grant such a broad right of action. Appellants lack standing to pursue this action under section 303; the district court properly dismissed their complaints.9/

The judgment of the district court is AFFIRMED.

FOOTNOTES

1/ The factual statements are taken from the complaints filed by appellants in the district court. For purposes of reviewing an order of dismissal for lack of standing, we must accept as true all material allegations of the complaints and construe them in favor of the complaining parties. Warth v. Seldin, 422 U.S. 490, 501 (1975).

2/ Section 303 provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> (b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 187 (1976).

3/ Appellees allegedly violated section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D)(1976), which provides in relevant part:

> (b) It shall be an unfair labor practice for a labor organization or its agents . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle of work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

. . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . .

4/ Section 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (Supp. V 1981).

5/ Section 303 was proposed and enacted as an alternative to subjecting unions to antitrust liability for secondary activity. See 93 Cong. Rec. 4834-4874 (1947) (debates over Senator Ball's proposal for antitrust sanctions and Senator Taft's compromise proposal for actual damages); Connell v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 634 (1975); Mead v. Retail Clerks International Ass'n Local No. 839, 523 F.2d 1371, 1376 (9th Cir. 1975). While this alternative legislation served to reduce the punitive impact of damage awards available under the antitrust laws, section 303, like section 4, serves both a compensatory and deterrent function. See 93 Cong. Rec. 4858 (1947) (Senator Taft commenting on the intended deterrent and remedial impact of § 303), reprinted in 2 NLRB, Legislative History of the Labor Relations Act, 1947, at 1371 (1948); Jaden Electric v. IBEW, Local 211, 508 F. Supp. 983, 987 (D. N.J. 1981); see generally Comment, Standing To Sue Under Section 303 Of The Labor Management Relations Act, 45 N.Y.U. L. Rev. 539, 549-50 (1970). Given the close similarity in the terminology employed in section 4 and section 303, the fact that section 303 was enacted in lieu of applying antitrust sanctions for secondary activity, and the commonality of functions served by the two statutes, judicial construction of section 4 may have influenced how Congress viewed the operative effect of section 303. In the legislative debates leading to section 303(b)'s inclusion in the Senate version of the Taft-Hartley amendments, Senator Morse criticized the section's apparent breadth and challenged its proponents to "find another statute that has such sweeping power as is given in this bill to bring suits when there are secondary injuries and not primary injuries." 93 Cong. Rec. 4872 (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1398 (1948).

Senator Taft, the section's and bill's major sponsor, responded:

> The Senator asks for a parallel and I can give him one. Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages. But the parallel is exactly the same, only under the Sherman Act, if a group of businessmen put a small concern out of business, they are subject to a suit for damages. If a labor union does the same thing, why should it not be subject to a suit for damages?

Id. at 4872-4873.

This response indicates that the section's main sponsor anticipated that the courts would fashion standing limitations under section 303 comparable to the limitations courts created to limit the broad language governing antitrust standing under section 4.

6/ The principal problem associated with the "direct/ remote injury' test is that the standard is inherently imprecise and has consequently spawned a variety of approaches leading to results which are not easily reconciled. See United Mine Workers, Dist. 19 v. Osborne Mining Co., 279 F.2d 716 (6th Cir.), cert. denied, 364 U.S. 881 (1960) (injuries sustained by a business which dealt with a primary or neutral employer are unherently "indirect"); Gilchrist v. United Mine Workers, 290 F.2d 36 (6th Cir.), cert. denied, 368 U.S. 875 (1961) (injury to a business contracting with primary employer is "direct" if a symbiotic economic relationship exists between the two businesses and the contractor's tangible property is damaged by the union's actions); Pennsylvania Railroad Co. v. National

Maritime Union, 206 F. Supp. 797 (E.D. Pa. 1962) (interpreting Gilchrist to require only a close economic relationship between the plaintiff and the primary or neutral employer); Abbott v. Local 142, United Association of Journeymen, 429 F.2d 786 (5th Cir. 1970) (third party plaintiff has standing under section 303 where it is the alter ego of the primary or neutral employer); W.J. Milner & Co. v. International Brotherhood of Electrical Workers, Local 349, 476 F.2d 8 (5th Cir. 1973) (third party has standing if in "direct line of fire" and injury "reasonably foreseeable" by union); Sapp v. Drivers, Chauffeurs, and Helpers, Local 639, 542 F.2d 224 (4th Cir. 1976) (third party's injury direct where he was an "object" of the union's illegal activity).

7/ In addition to the legislative history and case law suggesting that section 4 standing principles should guide our interpretation of section 303 standing, the circumstances compelling the Supreme Court to adopt the McCready test are equally present in the case before us. In determining the parameters of standing under section 303 we assume that Congress did not intend to allow every person tangentially affected by a section 8(b)(4) violation to maintain an action for damages under section 303. Cf. Blue Shield of Virginia v. McCready, 102 S.Ct. at 2547-48. As in McCready, we are faced with a claim that an injury is too remote from the violation to warrant standing. We are also without any direct guidance from Congress as to the point beyond which liability should not extend.

Id.

8/ Our conclusion that appellants lack standing to sue for damages under section 303 does not leave them without a remedy. Section 10(K) of the Labor Management Relations Act, 29 U.S.C. § 160(K) (1976) authorizes the NLRB to hear and determine work jurisdiction

disputes upon the filing of an unfair labor practice charge under section 8(b)(4)(D), 29 U.S.C. 158(b)(4)(D) (1976). This procedure provides an expedited review and affords substantial protection to employees caught up in such a controversy.

9/ Section 303 permits recovery for injuries to "business or property." Appellees urge us to interpret this phrase to include only commercial interests or enterprises and to exclude loss of wages. We have heretofore not been called upon to determine the parameters of the "business or property" phrase contained in section 303. The identical phrase appears, however, in section 4 of the Clayton Act, 15 U.S.C. § 15 (Supp. V 1981) and it may be proper for us to look to judicial interpretations of the section 4 phrase for guidance in construing the phrase in the context of section 303. In Ostrofe vs. H.S. Crocker Co., 670 F.2d 1378 (1982), we held that an employee has standing to sue for damages incurred as a result of his discharge for his refusal to participate in effectuating an antitrust conspiracy. Id. at 1385. Although we did not expressly discuss the "business or property" limitation, it was implicit in our holding that the loss of employment in that context was within the "business or property" concept. Contrary results have been reached by other circuits on this issue. Compare Daily v. Quality School Plan Inc., 380 F.2d 484 (5th Cir. 1967) (loss of employment constitutes injury to business or property); Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967) (terminated employee injured in his business or property) with Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), cert. denied, 411 U.S. 938 (1973) (termination of employment not injury to business or property unless job constitutes commercial enterprise or venture). We note that recently the Supreme Court has implicitly given wide latitude to the business or property

limitation in holding that a consumer of services has standing under section 4 of the Clayton Act to sue for harm incurred as a result of anticompetitive practices directed at the provider of those services. Blue Shield of Virginia v. McCready, 102 S.Ct. 2540 (1982). Moreover, the Sixth Circuit apparently does not view loss of wages as outside the bounds of the section 303 business or property concept. Wells v. International Union of Operating Engineers, Local 181, 303 F.2d 73, 75 (6th Cir. 1962). Nevertheless, we do not find it necessary to reach the merits of appellee's "business or property" argument since we have concluded that appellants lack standing on other grounds. Appellees also assert that the dismissal of the suit should be affirmed on the grounds that appellants failed to exhause internal union remedies provided by article XX of the AFL-CIO Constitution, citing Santos v. District Council of Carpenters, 547 F.2d 197 (2d Cir. 1977), after remand, 619 F.2d 963 (2d Cir. 1980). Because we conclude that the suit was properly dismissed for lack of standing, we need not reach this argument.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ERIN FULTON, RICHARD W. GARRETSON, et al,	)	
Plaintiffs,	)	No. C-80-107
vs.	)	
PLUMBERS AND STEAMFITTERS, LOCAL 598, et al,	)	
Defendants.	)	
JOHN OSBORN, et al,	)	
Plaintiffs,	)	No. C-80-118
vs.	)	
PLUMBERS AND STEAMFITTERS, et al,	)	MEMORANDUM AND ORDER
Defendants.	)	

The plaintiffs in these consolidated actions have moved for certification of a class pursuant to Fed.R.Civ.P. 23. In considering this motion, the Court has encountered the separate issue of whether plaintiffs have proper standing to bring their actions under 29 U.S.C. § 1987. Defendants urge

the Court to dismiss the complaints in both actions for this reason; plaintiffs have responded to this issue in their reply memorandum. Moreover, both sides devoted substantial time to the issue during oral argument on plaintiffs' Motion to Certify Class. It is proper, therefore, to consider and decide the standing question at this juncture of the case. Because I have concluded that plaintiffs lack standing to sue and their actions must therefore be dismissed, it is unnecessary for me to decide the question of class certification.

The following facts are not in dispute:

1) The individual named plaintiffs and the class they seek to represent are members of certain local unions employed at the Washington Public Power Supply System (WPPSS) construction project at Hanford, Washington.

2) Defendants are the bargaining representatives for their respective union members who are also employed at the WPPSS Nuclear

Project. None of the plaintiffs are members of the defendant unions.

3) A jurisdictional work dispute arose between the defendant unions and the carpenters union.

4) All work at the jobsite was temporarily suspended by WPPSS on March 14, 1980 for reasons related to the jurisdictional work dispute described above.

5) Plaintiffs' allegations, if proved, would support a finding that defendants, through their conduct in the work dispute, committed an unfair labor practice under 29 U.S.C. § 158(b)(4).

Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations

> and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

The issue raised in the instant cases is whether the language of § 303 provides a right of action to members of neutral labor organizations for alleged wage losses under the circumstances of this case.

Research has revealed limited decisional authority on this question. Plaintiffs rely upon Wells v. International Union of Operating Engineers, 303 F.2d 73 (6th Cir. 1962), as supportive of their position. In Wells, the court decided, without elaboration, that employees of a primary employer could recover damages under § 303. The position taken in Wells, however, has since been refined by a later line of cases culminating with W.J. Milner & Co. of Florida v. International Brotherhood of Electrical Workers, Local 349 476 F.2d 8 (5th Cir. 1973) In Milner, the Fifth Circuit traced the cases beginning

with United Brick and Clay Workers v. Deena Artware, 198 F.2d 637 (6th Cir. 1952). The court noted that application of § 303 generally had been limited to neutral and primary employers, but cited cases where this rule was extended to include third parties other than neutral or primary employers. Those cases involved two types of situations: (1) where an integrated business or an alter-ego relationship exists between the plaintiff and the primary or neutral employers, or (2) where there has been direct, as opposed to incidental, damage sustained by the plaintiff. The Milner court construed Wells as falling into the latter category.

> Although the [Wells'] court failed to give adequate explanation for this conclusion, it is implied from the opinion that these employees were considered to be the object of secondary boycott just as much as the primary employer was because they were the very individuals sought to be organized by the union.

The court in Milner went on, however, to reject that line of case law because "[n]one of the decisions that we have discussed under-

took a specific analysis of this issue in light of the purposes and policies of the Labor Management Relations Act. The deficiencies in [that] line of cases in this connection makes them less persuasive then they might have been." 476 F.2d at 12. The court held that "[i]n determining whether Milner has a right to recover under § 303 the fundamental question in our estimation is whether such a result if followed in all similar situations would threaten or undermine legitimate union interests. . . ." Id.

I agree with this reasoning adopted by the Fifth Circuit. Although under the facts in Milner the court held for the plaintiff, I find that the facts and circumstances in the instant cases call for a different result.

Plaintiffs seek the certification of a class which they estimate to be eighteen hundred in number. None of the class members allege a direct or intentional injury from

the conduct of the defendant unions; rather, plaintiffs' wage losses are purely secondary and incidental. The ruling sought by plaintiffs would have a stifling effect on the ability of unions to pursue in good faith their lawful rights. Such a rule would allow all employees affected by the conduct of an unrelated union on the same worksite to recover damages if the conduct of such union were later determined to constitute an unfair labor practice.

If the courts permit such expansive litigation involving indirect losses such as are claimed here, the ability of labor to exercise its rights under the national labor policy of this country would be seriously jeopardized. If such claims are to be allowed, clear authority should come from the Congress.

There is nothing to be gleaned from the legislative history of § 303 which indicates an intent of Congress that persons in plaintiffs' position should be allowed

a right to sue under § 303. On the contrary, the only references in the Congressional Record concern the protection of small businessmen, 93 Cong. Rec. at 5060, and farmers, 93 Cong. Rec. at 5062.

Finally, § 303 plainly states that damages are limited to injuries to "business or property." While the courts have not defined this phraseology in the context of § 303, the Supreme Court has interpreted "business or property" as it appears in § 4 of the Clayton Act, 15 U.S.C. § 15. In Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 264 (1971), the court held: "Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises." Absent Congressional expression to the contrary the same meaning should logically attach to the language of § 303. Given such a meaning, it is clear that wages earned by an employee are not commercial interests or

enterprises within the meaning of that section.

For the reasons stated above, the consolidated actions Nos. C-80-107 and C-80-118 are DISMISSED. The Clerk shall enter judgment in favor of the defendants.

IT IS SO ORDERED.

DONE BY THE COURT this 24th day of April, 1981.

_____
Robert J. McNichols
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

ERIN FULTON, RICHARD W. GARRETSON, et al,	)	
Plaintiffs,	)	No. C-80-107
vs.	)	JUDGMENT
PLUMBERS AND STEAMFITTERS, LOCAL 598, et al,	)	
Defendants.	)	

This action came on for hearing before the Court, Honorable Robert J. McNichols, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the consolidated actions Nos. C-80-107 and C-80-118 are dismissed and judgment is entered in favor of the defendants.

Dated at Spokane, Washington, this 24th day of April, 1981.

_____

Clerk of the Court

[THIS PAGE INTENTIONALLY LEFT BLANK]

No. 82-1678

Office Supreme Court, U.S.
FILED
MAY 16 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Spring Term, 1983

ERIN FULTON, et al.,

Petitioners,

v.

PLUMBERS AND STEAMFITTERS
LOCAL 598, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OPPOSING CERTIORARI

HUGH HAFER
Hafer, Cassidy & Price

Counsel for Respondents
Local 598 and McKnight

2815 Second Avenue
Suite 410
Seattle, Washington 98121
(206) 624-4515

QUESTION PRESENTED

(Counterstatement)

Taft Hartley §303 created a claim for "damages" in the event of injury to "business or property" suffered "by reason of" a jurisdictional dispute between unions. The question is whether Section 303 encompasses a suit by employees for wages lost in the course of a jurisdictional dispute.

TABLE OF CONTENTS

		page
STATEMENT OF THE CASE		1
ARGUMENT WHY CERTIORARI SHOULD BE DENIED		1
A.	The Court Below Correctly Held That Petitioner Employees Were Not Injured "By Reason Of" The Jurisdictional Dispute.	1
B.	Legislative History And Federal Labor Policy Militate Against Creating A Claim In Favor Of Employees Asserting Wage Loss Incidental To A Jurisdictional Strike.	4
C.	The Decision Below Does Not Conflict With The Wells Opinion Of The Sixth Circuit. The Standing Issue Presented In This Case Was Not Raised In The Wells Case.	6
CONCLUSION		9

TABLE OF AUTHORITIES

i. Cases

	page
Associated General Contractors v.Carpenters, ___ U.S. ___, 74 L.Ed. 2d 723 (1983)	4
Blue Shield of Virginia v. McCready, ___ U.S.___, 73 L.Ed.2d 149 (1982)	2,3, 4
Electrical Workers v. Foust, 442 U.S. 42 (1979)	5
Fulton v. Plumbers and Pipefitters Local 598, 695 F.2d 402 (9th Cir. 1982)	1,3, 5
NLRB v. Indiana & Michigan Elec. Co., 318 U.S. 9 (1943)	6
Wells v. International Union of Operating Engineers, Local 181, 303 F.2d 73 (6th Cir. 1962).	6,7, 8,9

ii. Statutes

15 U.S.C. §15	2
29 U.S.C. §160(k)	6
29 U.S.C. §160(l)	6
29 U.S.C. §187	2,4,7

iii. Administrative Rule

NLRB Rule 102.9	6

iv. Legislative History

S.Rep. No. 105 on S. 1126, supplemental views, 80th Cong.1st Sess. 54 (1947) reprinted in 1 NLRB Legislative History of the LMRA, 1947 p. 460	5

STATEMENT OF THE CASE

The statement set forth by Petitioners follows largely the statement set forth by the court of appeals, construing the facts in favor of Petitioners, 695 F.2d at 403, n.3. The Ninth Circuit affirmed the district court's dismissal for lack of standing, finding Petitioner employees were not injured "by reason of" an alleged Section 8(b)(4) violation. The court below held that the wage loss was not a "necessary and integral" consequence of the violation and was "not reflective of Congress' core concerns in prohibiting" jurisdictional strikes. 695 F.2d at 407-408.

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

A. The Court Below Correctly Held That Petitioner Employees Were Not Injured "By Reason Of" The Jurisdictional Dispute.

Taft Hartley §303, 29 U.S.C. §187, created a federal claim for "damages" upon proof of injury to "business or property" suffered "by reason of" a jurisdictional dispute or secondary boycott. The court below held that employees who lose wages are not injured "by reason of" an alleged section 303 violation. Taft-Hartley §303 and the Clayton Act §4, 15 U.S.C. §15, contain the standing requirement that injury be suffered "by reason of" the statutory violation. Thus, the Court below correctly used the two-prong test set forth in Blue Shield of Virginia v. McCready, ___U.S.___, 73 L.Ed.2d 149 (1982).

The McCready test looks to (1) the nexus between the alleged statutory violation and the harm alleged and (2) the relationship of the injury to the injuries "about which Congress was likely to have been concerned in making defendant's

conduct unlawful and in providing a private remedy," 73 L.Ed.2d at 160.

There is no nexus between the alleged jurisdictional activity and the Petitioners' wage loss. The object of a jurisdictional strike is to require an employer to reassign certain work, not lay off workers. "This consequence was not a 'necessary and integral' aspect" of the alleged violation, and "the injury alleged is too remote" to warrant Section 303 standing, 695 F.2d at 407.

The holding below is consistent with McCready, where standing was present because the harm to health plan subscribers by withholding claim payments was foreseen and was a "necessary step" in effecting the ends of the antitrust violation. It is a foreseeable and "necessary step" in a jurisdictional strike that the strikers cease work. But it is neither foreseeable nor a "necessary

step" that co-workers be laid off in order to effect a reassignment of certain work functions from one craft to another craft. The court below was in good company when it "denied standing to employees with merely derivative injuries." Associated General Contractors v. Carpenters, 74 L.Ed.2d 723, 740 n. 46 (1983).

B. Legislative History and Federal Labor Policy Militate Against Creating A Claim In Favor Of Employees Asserting Wage Loss Incidental To A Jurisdictional Strike.

The second prong of the McCready standing test looks to the relationship of the injury alleged to the type contemplated by Congress when it created the claim. This inquiry is appropriate in all federal question cases. As noted by the court below, Congress through Section 303 intended to protect small businessmen and

farmers, not employees. 695 F.2d at 407-408, citing e.g. S. Rep. No. 105 on S. 1126, supplemental views, 80th Cong. 1st Sess. 54 (1947), reprinted in 1 NLRB Legislative History of the LMRA, 1947 P. 460. There is no indication in the legislative history that incidental injury to the employees of such employers falls within Congressional intendment.

Petitioners seek class action damages for about 1,800 workers who were earning $150.00 per day. Damage awards of this magnitude would, as noted below, render unions "incapable of effective representation" and "inhibit legitimate union activity." 695 F.2d at 408. When a new damage theory is tendered the potential for "impairing the effectiveness of unions as collective-bargaining agents" must be weighed. Electrical Workers v. Foust, 442 U.S. 42, 50-51 (1979).

Petitioners are not without a remedy. Anyone can file an unfair labor practice charge. See: NLRB Rule 102.9 and NLRB v. Indiana & Michigan Elec. Co., 318 U.S. 9, 17-18 (1943). Taft Hartley 10(k), 29 U.S.C. § 160 (k), provides for expedited administrative proceedings in jurisdictional disputes. The NLRB routinely seeks and obtains injunctive relief in such cases. 29 U.S.C. §160(1). A suitor who fails to seek an available remedy suffers no wrong when the courts refuse to create a new cause of action for his benefit.

C. The Decision Below Does Not Conflict With The Wells Opinion Of The Sixth Circuit. The Standing Issue Presented In This Case Was Not Raised In The Wells Case.

Petitioners assert that the decision below conflicts with the decision of the Sixth Circuit in Wells v. International

Union of Operating Engineers, Local 181, 303 F.2d 73 (6th Cir. 1962). However, the issue of employee standing to sue under Section 303, decided by the court below, was not presented in Wells. In Wells the union asserted insufficient jurisdictional amounts. The union brief presented the following issue for review (p. 6):*

> Whether the Plaintiffs-Appellees other than Tye & Wells were properly before the Court as to jurisdictional amounts. (Emphasis added)

The union's argument in Wells was consistent with its statement of issue. At page 15 of the union brief it was said:

---

* Copies of the appellant's and appellees' briefs in Wells have been forwarded under separate cover to the Clerk of this Court and counsel for Petitioners.

> In this case jurisdiction of the Court would not be obtained by adding the individual Plaintiff-Appellees....since none of their individual claims were sufficient in amount to grant jurisdiction to the Court under its rules and the statutes appertaining thereto.

The Wells plaintiff-employees replied at page 27 of their appellate brief:

> As the statute plainly states, jurisdiction is conferred without respect to the amount in controversy. Whoever is injured may sue, whether primary employer, secondary employer, or employee.

Rejecting the union's jurisdictional argument the Sixth Circuit wrote (303 F.2d at 75):

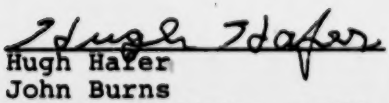
> Clearly jurisdiction is conferred to permit whoever is injured to sue without respect to the amount in controversy.

Put simply the standing issue, decided below, was not presented in Wells. Since the Wells court did not decide a contested standing issue, there is no conflict between Wells and the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



Hugh Hafer
John Burns
HAFER, CASSIDY & PRICE
Attorneys for Respondents
Local 598 and Ray McKnight

Office-Supreme Court, U.S.
FILED
SEP 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1678

In the Supreme Court of the United States

OCTOBER TERM, 1983

ERIN FULTON, ET AL., ETC., PETITIONERS

v.

PLUMBERS AND STEAMFITTERS, LOCAL 598, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ELINOR HADLEY STILLMAN
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether employees who lose wages as a result—direct or indirect—of a jurisdictional strike that violates Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(D), have standing to sue the responsible union for damages under Section 303 of the Labor Management Relations Act, 29 U.S.C. 187.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Statement	2
Discussion	6
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Associated General Contractors v. *Carpenters*, No. 81-334 (Feb. 22, 1983) 6, 11, 12, 13, 17

Blue Shield of Virginia v. *McCready*, 457 U.S. 465 ..... 5, 11

Gilchrist v. *United Mine Workers*, 290 F.2d 36 7

Hawaii v. *Standard Oil Co.*, 405 U.S. 251 . 4

Reiter v. *Sonotone Corp.*, 442 U.S. 330 11

Sapp v. *Drivers, Chauffeurs & Helpers Local Union 639*, 542 F.2d 224 10

United Brick & Clay Workers v. *Deena Artware, Inc.*, 198 F.2d 637 ..... 6, 8

United Mine Workers v. *Osborne Mining Co.*, 279 F.2d 716 7

W.J. Milner & Co. v. *IBEW, Local 349*, 476 F.2d 8 ..... 9, 10

Wells v. *International Union of Operating Engineers, Local 181*, 303 F.2d 73 ..... 7, 8

Statutes:

Act of July 7, 1955, Section 3, 69 Stat. 283 .. 7

Clayton Act, Section 4, 15 U.S.C. 15. . 4, 6, 7, 11, 12

Statutes:—Continued Page

Labor Management Relations Act, 29 U.S.C. 141 *et seq.*:
Section 303, 29 U.S.C. 187 ..... *passim*
Section 303(a), 29 U.S.C. 187(a) 4
Section 303(b), 29 U.S.C. 187(b) 4, 6

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
Section 8(b)(4), 29 U.S.C. 158(b)(4) .. 3, 4, 16
Section 8(b)(4)(D), 29 U.S.C. 158(b)(4)(D) 1
Section 10(*l*), 29 U.S.C. 10(*l*) 16

Sherman Act, Section 7, 26 Stat. 210.... 7, 11, 12

Miscellaneous:

Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 979 11

Legislative History of the Labor Management Relations Act (1947) 14, 15

Note, *Standing to Sue Under Section 303 of the Labor Management Relations Act*, 45 N.Y.U.L. Rev. 539 10-11

S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 15

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1678

ERIN FULTON, ET AL., ETC., PETITIONERS

v.

PLUMBERS AND STEAMFITTERS, LOCAL 598, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 695 F.2d 402. The memorandum and order of the district court (Pet. App. D) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1982. The petition for a writ of certiorari was filed on March 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(D), is reproduced at Pet. App.

B. Section 303 of the Labor Management Relations Act, 29 U.S.C. 187, is reproduced at Pet. App. A. See also page 3 note 2, *infra*.

STATEMENT

1. Petitioners are employees of Guy F. Atkinson Co. and Wright-Schuchart-Harbor ("AWSH"), a joint venture engaged in construction work at the Washington Public Power Supply System projects at Hanford, Washington.[1] Most of the petitioners are carpenters who are members of the Carpenters Union; the remaining petitioners belong to other unions. None of the petitioners are members of the respondent unions—locals of the Plumbers Union and the International Brotherhood of Electrical Workers. This action arises from a dispute over work assignments at the Hanford site between the Carpenters Union and the two respondent unions that developed in 1979. The controversy was submitted to the AFL-CIO Impartial Jurisdictional Disputes Board under Article XX of the AFL-CIO constitution. That board awarded part of the disputed work to the Carpenters, and AWSH made work assignments in conformity with the award. In March 1980, however, the respondent unions demanded that the work so assigned be reassigned to their members, and some of those members thereafter destroyed work completed by the carpenters at the site and encouraged a site boycott. In response to these actions, AWSH suspended operations for ten days. As a result,

---

[1] The facts alleged in petitioners' complaints, which were accepted as true for purposes of the motion to dismiss the complaint, are stated in the opinion of the district court (Pet. App. D) and the opinion of the court of appeals (695 F.2d at 403-404). (Because the reproduced text of the court of appeals opinion at Pet. App. C is not paginated, we cite the published report of the court of appeals' decision.)

all employees at the site (some 1800 individuals) were laid off and suffered ten days' wage loss.

Petitioners brought suit in the United States District Court for the Eastern District of Washington against the respondents under Section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 187, seeking to recover wages and benefits lost during the work suspension.[2] Petitioners also sought certification of a class consisting of all employees laid off at the Hanford site during the 10-day period.

2. Without ruling on the class certification motion, the district court dismissed the complaints on the ground that plaintiffs lacked standing to sue for dam-

---

[2] Section 303 of the LMRA provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section [8(b)(4) of the National Labor Relations Act, as amended].
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of [29 U.S.C. 185] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 8(b)(4) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(4), provides that it shall be an unfair labor practice for a labor organization or its agents to engage in a strike pressure or otherwise to restrain or coerce others with the objective of

> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work * * *.

ages under Section 303 of the LMRA (Pet. App. D).[3] The court reasoned that the wage losses alleged were only "secondary and incidental" to the allegedly unlawful union conduct rather than "a direct or intentional injury from the conduct of the [respondent] unions," that permitting recovery for such incidental losses would seriously jeopardize the ability of unions to pursue lawful objectives, and that the legislative history of Section 303 suggested that Congress' objective was to protect the interests of small businessmen. The court also observed that damages under Section 303 were limited to persons injured in their "business or property." Relying upon *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972), which construed the identical phrase in Section 4 of the Clayton Act, 15 U.S.C. 15, the district court concluded that plaintiffs' wages did not constitute "business or property" within the meaning of Section 303(b).

3. The court of appeals affirmed. It concluded (695 F.2d at 405-408) that plaintiffs did not meet a standing requirement imposed by Section 303(b)'s limitation of the right of action created to persons injured *"by reason of* any violation of" Section 303(a). In reaching this conclusion, the court relied in part on the reasoning of cases concerning standing to sue under Section 4 of the Clayton Act. The court of appeals acknowledged (695 F.2d at 406-407), however, that, given the distinct remedial policies of the Clayton Act and the federal labor laws, antitrust standing principles could provide only "general guidance," and that construction of Section 303 of the LMRA must be informed by "the policies reflected in the National Labor Relations Act."

The court observed that the Ninth Circuit had employed a "target area" analysis in Clayton Act cases under which a plaintiff could establish standing only if he

---

[3] The district court found that petitioners' allegations, if proven, would support a finding that respondents had committed an unfair labor practice under 29 U.S.C. 158(b)(4).

showed that he "was within the target area of the defendant's illegal practices and was not only 'hit,' but also 'aimed at'" (695 F.2d at 407, citation omitted). The antitrust standing analysis had been "refined" in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), the court of appeals noted. 695 F.2d at 407. There, this Court had held that, when "faced with a claim that an injury is too remote from the alleged violation to warrant § 4 standing," a court must look "(1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy * * *" (*Blue Shield of Virginia* v. *McCready*, *supra*, 457 U.S. at 477-478).

Applying these principles here, the court of appeals determined that the "principal object of the appellee unions' illegal activities was to pressure the site employer to reassign work from members of the Carpenters' Union to members of the appellee unions," and that the employers' response—"suspending operation and temporarily laying off workers"—was not a "'necessary and integral' aspect of the section 8(b)(4)(D) violation" (695 F.2d at 407). The court also reasoned that "the injury alleged is not reflective of Congress' core concerns in prohibiting the type of conduct engaged in by appellee unions," inasmuch as "[s]ection 303's legislative history reveals that Congress was principally concerned with the debilitating effect secondary activity and jurisdictional disputes have on farmers and small businesses." 695 F.2d at 407. The court found no indication that "Congress sought to extend the right of action afforded by section 303 to employees of an injured employer." 695 F.2d at 408.[4]

---

[4] The court of appeals found it unnecessary to decide whether, as the district court had indicated, an employee's wages are

DISCUSSION

The court of appeals cautiously applied standing principles developed under Section 4 of the Clayton Act, while taking into account the general policies of the National Labor Relations Act, in determining whether particular plaintiffs have standing to sue for damages under Section 303 of the LMRA. This line of analysis was, in our view, generally correct. However, the court of appeals did not have the benefit of the recent decision in *Associated General Contractors* v. *Carpenters*, No. 81-334 (Feb. 22, 1983), in which this Court canvassed the varying tests for antitrust standing employed by the different courts of appeals and elucidated the factors to be considered in determining whether a plaintiff has standing to sue for damages under the Clayton Act. Because of this intervening development, this case should be remanded to the court of appeals for further consideration in the light of *Associated General Contractors*.

1. We find no clearly-defined conflict among the circuits that would warrant plenary review by this Court at this time.

The Sixth Circuit has explored the scope of standing under Section 303 in a series of decisions. In *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F.2d 637, 643-644 (1952), the court of appeals stated that the "[w]hoever shall be injured" language of Section 303 should be read broadly and held that a primary employer—as opposed to the neutral employer—could sue under Section 303 for damages resulting from a secondary boycott. The court noted (198 F.2d at 644) that allowing a Section 303 suit by anyone injured in his business by an unlawful boycott was consistent with the construction given "analogous provisions of the

---

not "business or property" within the meaning of Section 303(b). 695 F.2d at 408 n.9.

Sherman Anti-Trust Act, 15 U.S.C.A. §§1-7."[5] Eight years later, however, in *United Mine Workers* v. *Osborne Mining Co.*, 279 F.2d 716 (1960), the Sixth Circuit held that a *sales agent* of a coal producer could *not* sue to recover damages for sales lost because of a boycott aimed at pressuring the coal producer into recognizing the union.[6] Again, looking to decisions under the antitrust laws, the court concluded that the damage claimed by the agent was "incidental and too remote for recovery under federal law." 279 F.2d at 729. *Osborne* was distinguished in *Gilchrist* v. *United Mine Workers*, 290 F.2d 36 (6th Cir. 1961), where the court held that Section 303 conferred standing on a partnership that sold the coal mined by the employer that was the primary object of the secondary boycott where the sales agent and the primary employer formed part of an integrated coal business.

Petitioner claims (Pet. 8-9) that the Sixth Circuit addressed the precise question presented here in *Wells* v. *International Union of Operating Engineers, Local 181*, 303 F.2d 73 (1962), resolving the issue in a fashion contrary to the ruling below. Petitioner relies upon the following language in the Sixth Circuit's opinion in *Wells* (303 F.2d at 75 (emphasis added)):

> The final question raised by the defendants as to whether the Court had jurisdiction to hear the claims of the individual [employees of the employer with which the unions had their primary dispute], is without merit. *Clearly, jurisdiction is conferred*

---

[5] The language of Section 7 of the Sherman Act, 26 Stat. 210, was borrowed by Congress in 1915, when it drafted the parallel provision of the Clayton Act, Section 4, 15 U.S.C. 15. (In 1955 Congress repealed Section 7 of the Sherman Act because it was superseded by other legislation. Act of July 7, 1955, Section 3, 69 Stat. 283.)

[6] The agent was not one of the neutral employers whose employees were the subject of union strike appeals.

to permit "whoever" is injured to sue without respect to the amount in controversy.

Although the Sixth Circuit's opinion is couched in terms of jurisdiction and appears to refer to a dispute about the necessity of meeting a threshold jurisdictional amount, because of the court's reference to "'whoever' is injured," petitioner interprets this language as addressing the issue at hand. Quoting from the briefs filed in *Wells*, however, respondent argues (Br. in Opp. 7-9) that the only question presented there was whether the claims of individual employee plaintiffs in *Wells* had to satisfy a requirement as to jurisdictional amount. A review of the briefs filed in *Wells* discloses some support for each party's reading of *Wells*. On balance, however, we find sufficient merit in respondent's contention to doubt that the Sixth Circuit would deem itself bound by stare decisis to decide the present case contrary to the decision of the court of appeals below.[7]

---

[7] The questions presented are stated in varying fashion in the appellants' brief in *Wells*. Compare brief at i (questions 1(b) and 3) with brief at 6. The different formulations employed tend to support the two different assessments of the scope of the issue in *Wells*. But we find it most telling that there is no *argument* devoted to the standing issue in the appellants' brief, and that appellees responded only to the argument based on jurisdictional amount. See Brief for Plaintiffs-Appellees at 25-27. Thus, the union seemingly overlooked the standing argument in *Wells*, and the Sixth Circuit's reference to the particular plaintiffs as employees may have been intended only for purposes of identification. To be sure, the Sixth Circuit cited its prior decision in *Deena Artware* as authority for the ruling quoted above. See 303 F.2d at 75-76. But the *Wells* panel did not identify the particular language of *Deena Artware* it intended to invoke, and it turns out that, in a portion of the opinion in *Deena Artware* separate from that discussed above, the Sixth Circuit had noted that Section 303 waives the requirement of pleading a sufficient amount in controversy. Compare 198 F.2d at 640 with 198 F.2d at 643-644. Accordingly, there can be no assurance that the *Wells* panel recognized the standing issue presented here or in-

The Fifth Circuit has also addressed the standing issue under Section 303. In *W.J. Milner & Co.* v. *IBEW, Local 349*, 476 F.2d 8 (1973), unions exerted pressure on electrical contractors doing business in southern Florida in an effort to dissuade them from using products manufactured by Southwire, the employer with which the union had its primary dispute. The plaintiff, Milner, was Southwire's exclusive distributor in southern Florida and that distributorship represented a substantial portion of Milner's business. The court held that Milner could maintain suit under Section 303 to recover its damages resulting from the secondary dispute. The court summarized prior decisions as establishing that a third party could recover damages under Section 303 if it showed (476 F.2d at 11-12):

> some combination of the following circumstances: (1) an integrated business enterprise which includes the third party and either the primary or the neutral employer; (2) direct injury to the third party's property; and (3) a principal-agent relationship between the third party and the primary employer.

Using the "target area" metaphor familiar from decisions under the antitrust laws, the Fifth Circuit reasoned that Milner had standing because, as the de facto "sales arm of Southwire in the peninsular Florida area" it was "directly in [the union's] line of fire." 476 F.2d at 12. The court observed that, given the facts of the case, its ruling established no precedent for "unlimited liability under § 303 [that] might produce financial disaster for unions and inhibit the exercise of the right to strike." *Ibid.* The court also emphasized that the stand-

---

tended to resolve it. Given the vintage of the case, the uncertainty as to whether the issue was deliberately resolved, and the lack of explanatory discussion, we believe the Sixth Circuit would be willing to examine this issue afresh should it arise in that court in the future.

ing of a plaintiff such as Milner "must be assessed on a case by case basis." *Ibid.*[8] Given the carefully limited holding of *Milner* we cannot agree with petitioners' suggestion (see Pet. 15-17) that the Fifth Circuit would have decided the present case differently from the Ninth Circuit.[9]

In view of the relatively undeveloped state of the law respecting the standing of employees who lose wages to recover those wages under Section 303, we believe that the issue should be allowed to ripen in the courts of appeals before this Court grants plenary review. In this case, however, we think that further consideration of the issue by the court of appeals is warranted.

2. As noted at the outset, we are in general agreement with the analytical approach employed by the court of appeals. Separate policy considerations underlying the antitrust laws and Section 303 dictate that standing principles developed in the former area cannot blindly be applied in cases under Section 303. See Note, *Standing to Sue Under Section 303 of the Labor Man-*

---

[8] Judge Godbold, concurring in the result, agreed that "some rational limiting standard was intended by Congress," but professed that he was "unable to understand what standard [wa]s being proposed" in the lead opinion (476 F.2d at 13-14).

[9] Actually, petitioner's assertion is that the Ninth Circuit would have decided *Milner* differently from the Fifth Circuit. That seems to us far from clear, and, in any event, sheds little light on whether further review is warranted in *this* case.

Nor does the Fourth Circuit's decision in *Sapp* v. *Drivers, Chauffeurs & Helpers, Local Union 639*, 542 F.2d 224 (1976), necessarily conflict with the decision below. In *Sapp* the Fourth Circuit held that a trucker who "worked for" both the primary employer and a secondary employer involved in a union boycott had standing to sue for "damages attributable to the cessation of his business with the prime employer." *Id.* at 225. It appears, however, that Sapp was something more than an employee, for the union's objective was characterized as replacement of "Sapp with a trucker *who employed* union members." *Id.* at 225 (emphasis added). Moreover, the court cited *Milner*, a case involving a business rather than employees.

agement Relations Act, 45 N.Y.U. L. Rev. 539, 549-551 (1970). The fact remains, however, that the courts generally have looked to antitrust decisions for guidance respecting application of Section 303. This cross-reference is reasonable, given the similarities in the statutory language,[10] and the legislative history of Section 303 (see pages 14-15, *infra*).

Yet antitrust standing principles have undergone substantial development since the decisions of the Fifth and Sixth Circuits discussed above. See, *e.g.*, *Associated General Contractors* v. *Carpenters*, *supra*; *Blue Shield of Virginia* v. *McCready*, *supra*; *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979); see also Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 979, 988 (1977). In the circumstances, the court of appeals decisions discussed above shed even less light than they otherwise would on whether those courts—in 1982— would have reached a different result from that reached by the Ninth Circuit in the subject case. More significantly, in this case the Ninth Circuit did not have the benefit of *Associated General Contractors*, this Court's most recent and most exhaustive discussion of standing under the antitrust laws. It is not clear that the court of appeals' analysis conforms to the teaching of *Associated General Contractors*.

a. In *Associated General Contractors*, two labor organizations brought suit charging, among other things, a conspiracy to coerce landowners and others who let construction contracts into hiring nonunion carpentry subcontractors, thereby imposing an anticompetitive restraint on the carpentry subcontracting market. The

---

[10] Like Section 303, both Section 4 of the Clayton Act, 15 U.S.C. 15, and its predecessor, former Section 7 of the Sherman Act (see page 7 note 5, *supra*), employ language limiting damages to those suffered "by reason of" the underlying statutory violations.

question presented in this Court was whether plaintiffs had standing to sue for damages under Section 4 of the Clayton Act. The Court noted the broad language of Section 4 (slip op. 10); but it also noted (*id.* at 11-12) that that provision and its precedessor, Section 7 of the Sherman Act, were enacted by Congress on the apparent understanding that common law principles respecting standing and tort liability would apply. The Court concluded (*id.* at 16-17; footnote omitted) that in resolving the standing question it was required to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them," since the judicial remedy "cannot encompass every conceivable harm that can be traced to alleged wrongdoing."

The Court enumerated the factors to be considered in determining the existence of standing in a particular case: (1) whether there is a causal connection between the antitrust violation and the harm to the plaintiff (slip op. 18); (2) whether the defendants specifically intended to harm the plaintiff (*ibid.*); (3) whether the plaintiff's injury is the type of injury about which Congress was concerned when it enacted the antitrust laws (*id.* at 19-21); (4) "the directness or indirectness of the asserted injury" (*id.* at 21-22); (5) the existence of an identifiable class of victims other than the plaintiff who would have a natural incentive to sue to enforce the laws in question (*id.* at 23); (6) whether the damages sought are easy to determine or highly speculative (*id.* at 23-24); (7) whether the case is manageable or whether it would entail burdensome litigation regarding apportionment of damages (*id.* at 24-26); and (8) whether there is a risk of duplicate recoveries (*i.e.* different parties recovering damages for essentially the same injury) (*ibid.*). Applying these factors, the Court concluded (*id.* at 26-27) that the plaintiff unions' "allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of in-

tent to harm the [plaintiff unions], [were] insufficient as a matter of law" to support standing.

These indicia do not all point the same way in the present case. For example, damages for loss of wages are easy to compute, a factor suggesting that the action may be maintained. But see note 11, *infra*. On the other hand, there exists another victim—the employer—with a completely adequate incentive to sue the respondents for redress for injuries caused by the allegedly unlawful jurisdictional strike. Moreover, under the analysis dictated by *Associated General Contractors* the court of appeals might find reason to distinguish between plaintiffs who are carpenters, whose work respondents allegedly sought to capture for themselves, and plaintiffs who did other work at the Hanford site and were laid off when the employer laid off all site employees for ten days. Because the carpenters' wage loss may be deemed to be somewhat more directly caused by the respondents' alleged actions, and may more readily be deemed an intended consequence of these actions, the carpenter plaintiffs—or perhaps some subgroup thereof—have a stronger claim than their fellow workers.[11]

b. Among the factors to be considered under *Associated General Contractors* is whether a plaintiff's injury

---

[11] The Ninth Circuit thus oversimplified matters in labeling the injury suffered by plaintiffs "too remote" to sustain their standing, observing that the employer's suspension of work was not a "'necessary and integral'" aspect of the alleged unfair labor practice. It may be correct that the laying off of the entire work force of 1800 employees was not integral to respondents' alleged unlawful actions, but the laying off of some carpenters, for at least some time during which they otherwise would have been working at the Hanford site, was inextricably bound up with the respondents' alleged objective to favor themselves in the assignment of work. Of course, limitation of the right of recovery along the lines suggested could make the computation of damages more difficult.

is the kind of injury Congress sought to avert. The court of appeals considered this factor (695 F.2d at 407-408), but its assessment (see page 5, *supra*) is not, in our view, entirely complete or balanced. The legislative history of Section 303 does not reveal any clear congressional intent to limit the Section 303 remedy to injured employers or to exclude employees in every case.

Section 303 was enacted as part of the Taft-Hartley amendments of 1947. It was added as a floor amendment sponsored by Senator Taft, who suggested it as a substitute for an amendment proposed by Senator Ball, which had been defeated, and which would have permitted private parties to seek injunctions as well as damages, as a remedy for illegal secondary boycotts and jurisdictional strikes. 2 *Legislative History of the Labor Management Relations Act* 1370 (1947) (hereinafter "*Leg. Hist.*"). Senator Taft characterized his proposal as "simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike"—a remedy which was needed in "the typical case of a secondary boycott, wherein the small businessman is practically put out of business." *Id.* at 1371. Such suits would restore "to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost." *Ibid.*

In a later colloquy on the amendment, Senator Morse objected that the language was too broad and might, for example, permit a union that engaged in a secondary boycott against a printing plant to be subjected to suits by "a thousand drug stores" that "do not receive delivery of a certain issue of a popular magazine." 2 *Leg. Hist.* 1397. Senator Taft responded that his proposal was similar to the damage remedy provided under the Sherman Act, except that only actual damages were permitted under his proposed amendment. *Id.* at 1398. He pointed out that "under the Sherman Act, if a

group of businessmen put a small concern out of business, they are subject to a suit for damages" and asked, "[i]f a labor union does the same thing, why should it not be subject to a suit for damages?" *Ibid.* Senator Morse then criticized the amendment for failing to include language expressing the limitations that judicial decisions had effectively engrafted onto the facially broad language of the antitrust damages provision. *Ibid.* Senator Taft did not reply to this criticism. The Taft amendment was thereafter adopted by the Senate vote. *Id.* at 1399-1400.

The history cited by the court of appeals (695 F.2d at 407-408) does not include the foregoing. Instead, it consists of remarks made by Senator Ball in support of his unadopted proposal (for which Section 303 was a substitute), and indications in the printed statements of Senators Ball, Taft, Donnell and Jenner accompanying the Senate Report on the Taft-Hartley bill in support of Senator Ball's proposed amendment. 2 *Leg. Hist.* 1347-1369; S. Rep. No. 105, 80th Cong., 1st Sess. 54-55 (1947), *reprinted* in 1 *Leg. Hist.* 460-461. This legislative history indicates that the Ball amendment was offered as an answer to the plight of small businessmen and farmers who were sometimes forced into bankruptcy if subjected to prolonged secondary boycotts or strikes. But at one point during the debate on his proposed amendment Senator Ball mentioned employees as beneficiaries of the private remedy to be created (2 *Leg. Hist.* 1350). Accordingly, the evidence of legislative intent as to the unsuccessful Ball amendment is somewhat equivocal.

It is nonetheless fair to say, of both the defeated Ball amendment and the successful Taft amendment, that Congress' focus was *primarily* on injuries to employers, and that any extension of the remedy to employees of the targets of boycotts (whether neutral or primary employers) should accordingly be undertaken with

great caution. Extending a Section 303 remedy to large classes of employees who are injured by actions taken by their employers in response to union boycotts might well—as the court of appeals noted (695 F.2d at 408)—pose a threat of open-ended liability that could deter even strike activity that is on the permissible side of the line drawn by the NLRA. This consideration and the overall pattern of remedies under the NLRA[12] militate against any open-ended reading of the right to sue conferred by Section 303.

* * * * *

In sum, the Court's most recent decision pertinent to the issue suggests that the court of appeals' analysis was not fully sensitive to the full range of pertinent considerations. While none of these factors necessarily compels a result different from that reached below, further consideration of the case in light of the intervening development in the law may dictate some adjustment of the result.

---

[12] The injunction remedy provided by Section 10(*l*) of the NLRA, 29 U.S.C. 160(*l*), and a contempt sanction for violation of the injunction, are available for deterring violations of Section 8(b)(4).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to that court for further consideration in the light of *Associated General Contractors* v. *Carpenters*, No. 81-334 (Feb. 22, 1983).

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ELINOR HADLEY STILLMAN
Attorney
National Labor Relations Board

SEPTEMBER 1983